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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ROGER E. CLARK,

Defendant and Appellant.

D055528

(Super. Ct. No. FBA700092)

APPEAL from a judgment of the Superior Court of San Bernardino County,
Steven A. Mapes, Judge. Affirmed.

Roger E. Clark appeals a judgment following his jury conviction of first degree murder (Pen. Code, § 187, subd. (a)).¹ On appeal, he contends: (1) the prosecutor committed prejudicial misconduct during closing argument in describing the reasonable doubt burden of proof; (2) he was denied effective assistance of counsel when his counsel

¹ All statutory references are to the Penal Code.

did not object to that misconduct; and (3) the trial court erred by not sua sponte giving a curative instruction regarding that misconduct.

FACTUAL AND PROCEDURAL BACKGROUND

In 2002, Charles Gibson moved to Sandy Valley in San Bernardino County, living in his motor home on property leased by Robert Price. Price and several other persons lived on the property in their motor homes, mobile homes, and trailers. All of the homes were close together (i.e., within a few feet). On May 11, 2006, Geraldine Paldi lived with her boyfriend, Danny Wilcox, in a mobile home on Price's property. That evening, Paldi and Wilcox had an argument during which he hit or slapped her. After he left, Paldi went to Gibson's motor home (about 20 to 30 feet away) to use his cellular telephone to call a friend and arrange a place to spend the night. As she walked to Gibson's home, she saw Clark sitting in the driver's seat of a white car Price had loaned to Clark, parked at the rear of her mobile home. Clark asked Paldi if she was okay and she replied that she was fine. On entering Gibson's motor home, Paldi saw Gibson and Carrie Abrao, who lived in another motor home on the property, sitting inside. Clark and Abrao had dated intermittently for two years and Clark did not like her spending time with Gibson. After making her telephone call, Paldi returned to her mobile home to look for her car keys.

After Paldi left Gibson's motor home, Abrao returned to her home and built a fire in a 55-gallon drum. Clark approached Abrao and asked whether she was okay. He placed a large knife on her stairs and left. About 20 minutes later, Abrao heard three gunshots. Paldi, who was inside her mobile home, heard four gunshots and hid on her

bedroom floor. Price was awakened about midnight by the sound of four 12-gauge shotgun blasts.

After hearing the gunshots, both Price and Abrao went outside and saw Clark leave Gibson's motor home, carrying a black, two and one-half foot gun. Clark placed the gun inside the white car, told Abrao he was not going to shoot her, and asked her to unplug Gibson's motor home from Price's electrical box. Clark went back inside Gibson's motor home and attempted to start its engine. Price (not Abrao) unplugged the electrical cord and then heard Gibson's voice inside his motor home. Price heard Clark tell Gibson to "shut up, he was going to give him medical attention." Gibson's motor home was then driven from the property. At about 3:00 a.m., the white car was driven away from the property. Price also heard a truck driving on the road at that time.

At about midnight, Kale Robinson received a telephone call informing him of a fire approximately three-fourths of a mile south of his farm in Sandy Valley. Using a spotting scope, he saw the fire from his front porch. However, when firefighters responded, they were unable to access the fire and returned to their station.

The following morning, Robinson rode his motorcycle to the site of the fire. He saw a human skull. When arson investigators arrived at the site later that day, they found a charred motor home that had been driven into the desert. They saw tire impressions from a vehicle (apparently not from the motor home) that had driven through a wash, stopped behind the motor home, made a three-point turn, and left. They also saw tire impressions from a motorcycle. Badly burned human remains were found in the rear portion of the motor home in what appeared to have been its bathroom. An autopsy of

the body showed the victim (Gibson) was alive and inhaled smoke while the motor home was burning. Bullet fragments were found in Gibson's thigh and buttock. The medical examiner concluded Gibson died from smoke inhalation and thermocutaneous burns. The gunshot wound to Gibson's thigh was probably a contributing cause of his death because it would have prevented him from escaping the fire.

Because of the extensive damage to the motor home, arson investigators were unable to determine the exact cause of the fire or whether an accelerant was used. However, it appeared the fire started in its cabin area and not its motor area. They found a Bic lighter in the motor home. They also found hospital paperwork in Gibson's name in what had been the living room area of the motor home. The investigators concluded the fire began inside the motor home and could not exclude arson as the cause of the fire.

During an interview on May 17, 2006, James "Bo" Gritz (who lived at the Sandy Valley airport) told police that after Gibson's death, Clark told him "he [Clark] was gonna be in trouble because something bad happened." Clark then told Gritz that he shot Gibson.

An information charged Clark with the first degree murder of Gibson (§ 187, subd. (a)). The prosecution presented evidence substantially as described above. In his defense, Clark presented the testimony of Troy Padgett, his former public defender, who stated Gritz had told him (Padgett) he made up the story he told police to prevent Gibson's son from trying to find his killer. Clark did not testify in his defense.

The jury found Clark guilty of first degree murder. The trial court sentenced him to 25 years to life in prison with the possibility of parole. Clark timely filed a notice of appeal.

DISCUSSION

I

Prosecutorial Misconduct

Clark contends the prosecutor committed prejudicial misconduct during closing argument in describing the reasonable doubt burden of proof.

A

Before closing arguments, the trial court instructed the jury with CALCRIM No. 220 on the reasonable doubt burden of proof:

"The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial.

"A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt.

"Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

"In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

The court also instructed the jury with CALCRIM No. 200 that "[y]ou must follow the law as I explain it to you, even if you disagree with it. *If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions.*" (Italics added.)

During her rebuttal closing argument, the prosecutor argued:

"For you to have a reasonable doubt you have to have articulable facts. A hunch, saying 'I don't know,' that's not enough. In your mind you need to be able to say 'I have reasonable doubt and this is why.' In this case you don't have an articulable fact to lead to reasonable doubt because there is none. The defendant is guilty."

Clark's counsel did not object to that argument by the prosecutor.

After the jury returned its verdict, Clark filed a motion for new trial on the ground the prosecutor committed prejudicial misconduct by misstating the reasonable doubt burden of proof during her closing argument. At the hearing on the motion, the trial court found that the prosecutor unintentionally misstated the law, but that her error did not affect the outcome of the trial based on the overwhelming evidence of Clark's guilt and its instruction with CALCRIM No. 200, stating the court's instructions on the law control over any contrary argument of counsel. The court denied the motion for new trial.

B

It is misconduct for a prosecutor to misstate the law generally and, in particular, to misstate the People's burden to prove all elements of a charged offense beyond a reasonable doubt. (*People v. Hill* (1998) 17 Cal.4th 800, 829-830.) For example, a prosecutor may not properly argue that for a jury to find a defendant not guilty "there

must be some affirmative evidence demonstrating a reasonable doubt" *or* that "defendant had the burden of producing evidence to demonstrate a reasonable doubt of his guilt." (*Id.* at pp. 831-832.)

To preserve for appeal a claim of prosecutorial misconduct, a defendant must timely object at trial to the purported misconduct and request a curative admonition, unless an admonition could not have cured the harm caused by the misconduct. (*People v. Hinton* (2006) 37 Cal.4th 839, 863; *People v. Earp* (1999) 20 Cal.4th 826, 858; *People v. Bell* (1989) 49 Cal.3d 502, 535 (*Bell*).) "A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Morales* (2001) 25 Cal.4th 34, 44.) Absent a fundamentally unfair trial under the federal Constitution, prosecutorial misconduct does not require reversal of the judgment unless it is prejudicial under state law, i.e., it is reasonably probable the defendant would have obtained a more favorable verdict absent the misconduct. (*Bell*, at pp. 534, 542; *People v. Castillo* (2008) 168 Cal.App.4th 364, 386; *People v. Crew* (2003) 31 Cal.4th 822, 839.) If the prosecutorial misconduct renders the defendant's trial fundamentally unfair under the federal Constitution, reversal of the judgment is required unless the misconduct is harmless beyond a reasonable doubt. (*Castillo, supra*, at pp. 386-387, fn. 9; *People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1323-1324.)

C

Clark asserts his conviction for first degree murder must be reversed because the prosecutor committed prejudicial misconduct by misstating the reasonable doubt burden of proof in her rebuttal closing argument. For purposes of this appeal, we presume the prosecutor misstated the law when she argued the jury would have to find "articulable facts" for it to have reasonable doubt regarding Clark's guilt. However, Clark waived or forfeited that misconduct by not timely objecting to that misstatement of law or requesting a curative admonition. (*People v. Hinton, supra*, 37 Cal.4th at p. 863; *People v. Earp, supra*, 20 Cal.4th at p. 858; *Bell, supra*, 49 Cal.3d at p. 535.) Based on this record, we conclude, and Clark does not argue otherwise, the prosecutor's misconduct could have been cured by a timely objection and curative admonition. Had Clark timely objected and requested an admonition, the trial court could have immediately admonished the jury that the prosecutor had misstated the law and then repeated its CALCRIM No. 220 instruction on the reasonable doubt burden of proof. Because Clark did not do so, he waived or forfeited that misconduct for purposes of appeal.

In any event, assuming *arguendo* the prosecutor's misconduct could not have been cured by a timely objection and admonition, we nevertheless would conclude the prosecutorial misconduct was not prejudicial. The trial court instructed with CALCRIM No. 220 on the reasonable doubt burden of proof and also instructed with CALCRIM No. 200 that "[y]ou must follow the law as I explain it to you *If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions.*" (Italics added.) The jury was correctly instructed on the applicable

reasonable doubt burden of proof and that the court's instructions superseded any conflicting argument on the law by counsel (e.g., the prosecutor). Because we presume the jury followed the trial court's instructions and nothing in the record shows otherwise, we conclude the jury followed the trial court's instructions and applied the correct reasonable doubt burden of proof, ignoring the prosecutor's closing argument misstating that burden. (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.) Based on the trial court's instructions and the strong evidence supporting the jury's verdict, we conclude it is not reasonably probable Clark would have obtained a more favorable verdict had the prosecutor not misstated the law.² We note two witnesses (i.e., Price and Abrao) saw Clark leave Gibson's motor home with a gun after they heard gunshots. They saw Clark reenter the motor home. Soon thereafter, it was driven away and burned in the desert. Clark subsequently told Gritz that he shot Gibson. The prosecutor's misconduct was not prejudicial. (*Bell, supra*, 49 Cal.3d at pp. 534, 542; *People v. Castillo, supra*, 168 Cal.App.4th at p. 386; *People v. Crew, supra*, 31 Cal.4th at p. 839.)

II

Ineffective Assistance of Counsel

Clark contends he was denied effective assistance of counsel when his counsel did not object to the prosecutor's misconduct.

² Based on the record in this case, we conclude Clark was not denied a fundamentally fair trial because of the prosecutor's misconduct in misstating the reasonable doubt burden of proof. Accordingly, we do not apply the *Chapman* standard of prejudicial error (i.e., harmless beyond a reasonable doubt) for federal Constitutional violations. (*People v. Castillo, supra*, 168 Cal.App.4th at pp. 386-387, fn. 9; *People v. Bordelon, supra*, 162 Cal.App.4th at pp. 1323-1324.)

A

A criminal defendant is constitutionally entitled to effective assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *Strickland v. Washington* (1984) 466 U.S. 668, 684-685 (*Strickland*); *People v. Pope* (1979) 23 Cal.3d 412, 422, disapproved on another ground by *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10.) To show denial of the right to counsel, a defendant must show: (1) his or her counsel's performance was below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance prejudiced the defendant. (*Strickland*, at pp. 687, 691-692; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217; *Pope*, at p. 425.) To show prejudice, a defendant must show there is a reasonable probability that he or she would have received a more favorable result had his or her counsel's performance not been deficient. (*Strickland*, at pp. 693-694; *Ledesma*, at pp. 217-218.) "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the [trial counsel's] errors, the factfinder would have had a reasonable doubt respecting guilt." (*Strickland*, at p. 695.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 215.) It is the defendant's burden on appeal to show that he or she was denied effective assistance of counsel and is entitled to relief. (*Ledesma*, at p. 218.)

"In evaluating a defendant's claim of deficient performance by counsel, there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' [citations], and we accord great deference to counsel's tactical

decisions. [Citations.] . . . Accordingly, a reviewing court will reverse a conviction on the ground of inadequate counsel 'only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.' [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 979-980, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

However, a court need not address the issue of whether a defendant's counsel performed deficiently before it addresses the issue of whether the defendant was prejudiced by that purported deficient performance. "If it is easier to dispose of an ineffectiveness claim on the ground of a lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland, supra*, 466 U.S. at p. 697.)

B

Assuming arguendo Clark's counsel performed deficiently as Clark asserts, we nevertheless conclude he has not carried his burden on appeal to show that such deficient performance prejudiced his case. (*Strickland, supra*, 466 U.S. at pp. 687, 691-692, 697; *People v. Ledesma, supra*, 43 Cal.3d at pp. 216-217; *People v. Pope, supra*, 23 Cal.3d at p. 425.) The trial court instructed with CALCRIM No. 220 on the reasonable doubt burden of proof and also instructed with CALCRIM No. 200 that "[y]ou must follow the law as I explain it to you *If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions.*" (Italics added.) The jury was correctly instructed on the applicable reasonable doubt burden of proof and that the court's instructions supersede any conflicting argument on the law by counsel (e.g., the prosecutor). Because we presume the jury followed the trial court's instructions and

nothing in the record shows otherwise, we conclude the jury followed the trial court's instructions and applied the correct reasonable doubt burden of proof, ignoring the prosecutor's closing argument misstating that burden. (*People v. Mickey*, *supra*, 54 Cal.3d at p. 689, fn. 17.) Based on the trial court's instructions and the strong evidence supporting the jury's verdict, we conclude it is not reasonably probable Clark would have obtained a more favorable verdict had his counsel timely objected to the prosecutor's misstatement of law regarding the reasonable doubt burden of proof. Alternatively stated, our confidence in the outcome of Clark's trial is not undermined by the purported deficient performance of his counsel. Because Clark was not prejudiced by his counsel's purported deficient performance, he was not denied his constitutional right to effective assistance of counsel. (*Strickland*, at pp. 687, 691-692, 697; *Ledesma*, at pp. 216-217; *Pope*, at p. 425.)

III

Purported Trial Court Error

Clark contends the trial court erred by not sua sponte admonishing the jury regarding the prosecutor's misstatement of law and giving a curative instruction (e.g., that the jury did not have to find articulable facts for reasonable doubt to exist). However, contrary to Clark's conclusory assertion, the trial court did *not* have a sua sponte duty to so admonish the jury or give a curative instruction.³ Rather, we conclude that, on the record in this case, the trial court properly instructed the jury on the general principles of

³ Clark concedes he did not request an admonition or instruction to cure the prosecutor's misstatement of law regarding the reasonable doubt burden of proof.

law necessary for the jury's understanding and determination of the case, which instructions included CALCRIM Nos. 200 and 220. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) Clark does not cite any case to support his assertion or to persuade us to conclude otherwise.⁴ Clark has not carried his appellate burden to show the court erred by not sua sponte admonishing the jury or giving a curative instruction.⁵

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

NARES, Acting P. J.

O'ROURKE, J.

⁴ The cases cited by Clark are wholly inapposite and do not merit substantive discussion. (See, e.g., *People v. Green* (1980) 27 Cal.3d 1, overruled on another ground in *People v. Hall* (1980) 41 Cal.3d 826, 834, fn. 3; *People v. Morales*, *supra*, 25 Cal.4th 34.)

⁵ Assuming arguendo the trial court so erred, we nevertheless would conclude the error was not prejudicial because it is not reasonably probable Clark would have obtained a more favorable verdict had the court given the admonition and curative instruction that he argues it should have given. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)